No. 84-20

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher Oil Company,
Petitioners,

vs.

GULF OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari To the Temporary Emergency Court of Appeals of the United States

RESPONDENT'S BRIEF IN OPPOSITION

JACK D. FUDGE
Counsel of Record
MICHAEL L. HICKOK
McCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Blvd.
Los Angeles, CA 90017
(213) 624-2400
Attorneys for Respondent Gulf Oil Corporation

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

Laurel Pipe Line Company
Mainline Pipelines Limited
Mid-Valley Pipeline Company
North River Energy Company
Oil Shippers Service, Inc.
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pyropower Corporation
Rio Blanco Oil Shale Partnership
Sarni S.P.A. — Refining
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemical Corporation
The Valley Venture Capital Fund Limited Partnership
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

No. 84-20

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher Oil Company,
Petitioners,

vs.

GULF OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari To the Temporary Emergency Court of Appeals of the United States

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Gulf Oil Corporation ("Gulf") opposes the Petition for Writ of Certiorari as set forth below.

JURISDICTION

Gulf agrees with Petitioners' statement of jurisdiction.

STATUTES INVOLVED

In addition to the statutes cited by Petitioners, Or.Rev. Stat. § 12.260 is the Oregon "borrowing statute" referenced by the Court of Appeals:

> **"12.260 Action barred, when barred in another jurisdiction.** When the cause of action has arisen in another

state, territory or country, between nonresidents of this state, and by the laws of the state, territory or country where the cause of action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

REASONS WHY THE WRIT SHOULD NOT ISSUE

1. The Standards For Entitlement to Attorney's Fees Under the Economic Stabilization Act Have Been Well Established and Do Not Need Review By This Court.

Review of the Emergency Appeals Court decision as to attorney's fees should not be granted for several reasons. First, the appellate court below merely ruled that the District Court could not disregard the controlling authority of *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402 (Em.App.), *cert. denied* ____ U.S. ____, 104 S.Ct. 278, 78 L.Ed 2d 258 (1983). Appendix A 36 - A 39. Petitioners make no reference to that decision in their petition. *Eastern Airlines* fully analyzed the attorney's fees provision of the Economic Stabilization Act, clearly placing petitioners on notice of the standard by which their attorney's fees claim would be evaluated. Second, the statute on its face belies the interpretation plaintiffs ascribe to it; the statute clearly states that where the overcharge was not intentional and resulted from bona fide error despite the existence of reasonable precautionary procedures, that "the liability of the defendant shall be limited to the amount of the overcharge," 12 U.S.C. § 1904 note. It does not say, as petitioners would suggest, that the amount of the liability is limited to the amount of the overcharge plus attorney's fees. Third, even if the appellate court wrongly concluded that petitioners were not entitled to attorney's fees, that decision only has application in this case; the appellate court's decision was based on findings of the

District Court as well as its own review of the record (not simply its own review of the record, as petitioners assert) and even if this Court should reach a contrary decision, it would be on the basis of factors peculiar to this case.

Barely a year ago this Court denied certiorari in *Eastern Air Lines*. Nothing in this case warrants a different decision here.

2. Fletcher's Claims Present No Grounds for Certiorari.

a. Standing.

Certiorari should not issue to consider Fletcher's standing because the theory advanced by Petitioners has no factual predicate in this action. Petitioners assert that under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed. 2d 707 (1977) a pass-on theory "may not be used offensively" by an indirect purchaser because a pass-on theory "may not be used defensively by a violator against a direct purchaser." Petition at 12-13. Petitioners then reverse this approach, asserting that the appellate court here recognized the passing-on defense so that it should therefore also have recognized the standing of an indirect purchaser to make an "offensive" claim. The immediate flaw in petitioners' argument is that the appellate court here held that a "pass-on" defense could *not* be asserted in this action. Appendix A 50. Accordingly petitioners seek certiorari on the basis of facts not presented in this action.

b. The Statute of Limitations.

Reviewing the appellate court's decision on the statute of limitations would aid no party other than Fletcher, and only aid him if he had standing, which he lacks. He asserts that the Court of Appeals should have authorized use of a 6 year statute of limitations rather than a 2 year statute. The application of the statute depended on facts peculiar

to this case as to residence, and the statute itself would not likely be involved in subsequent cases — both because of the particularities involved here and because the governing statute, the Economic Stabilization Act, has expired.

In similar circumstances, this Court has ruled that certiorari should not be granted. In *Rice v. Sioux City Memorial Cemetery*, 349 U.S. 70 (1955) this court granted a rehearing, vacated its decision, and dismissed the writ as improvidently granted, because a change in the governing statute meant that the decision would have application only to the litigants before the Court. Here, where the underlying statute has expired, the facts are peculiar to this case, and the litigant lacks standing, a decision by this Court would be reaching a problem that is at best "academic or episodic," *Rice, supra*, 349 U.S. at 74. Moreover, this Court has consistently deferred to determinations of state statutes of limitations by Courts of Appeals. *See Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 462, 18 L.Ed. 2d 886, 87 S.Ct. 1776 (1967); *Runyon v. McCrary*, 427 U.S. 160, 181, 49 L.Ed. 2d 415, 96 S.Ct. 2586 (1976) (deference to Court of Appeals' determination even where petitioner's contention was rational); *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534, 93 L.Ed. 1520, 69 S.Ct. 1233 (1949) (determination of meaning of statute of limitations for application in diversity case). Such deference should be accorded here.

CONCLUSION

No constitutional question is presented. Nor is any other issue of importance or broad significance before this Court. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

JACK D. FUDGE
Counsel of Record
MICHAEL L. HICKOK
McCUTCHEN, BLACK, VERLEGER & SHEA
Attorneys for Respondent
Gulf Oil Corporation

August 3, 1984